IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

OPERATING ENGINEERS LOCAL NO. 101 PENSION FUND, et al.,	)	
Plaintiffs,	)	
vs.	)	No. 01-0087-CV-W-SOW
K.C. EXCAVATING & GRADING, INC., et al.,	)	
Defendants.	)	

ORDER

Before the Court are plaintiffs' Motion for Summary Judgment (Doc. #35), plaintiffs' Suggestions in Support (Doc. #36), defendants' Suggestions in Opposition (Doc. #42), and plaintiffs' Reply Suggestions (Doc. #43). Plaintiffs' Motion for Order Granting Plaintiffs' Unopposed Motion for Summary Judgment (Doc. #37) is also before the Court, but it is dismissed as moot because the Court previously granted defendants leave to file their suggestions in opposition out of time. For the reasons stated herein, plaintiffs' motion for summary judgment is granted.

I. Background

Plaintiffs are: the International Union of Operating Engineers Local No. 101 ("the union"); Operating Engineers Local No. 101 Pension Fund, Health and Welfare Fund, Vacation Fund, and Apprenticeship Fund ("the funds"); and the trustees of each fund ("the trustees"). Plaintiffs' claims arise from two collective bargaining agreements between plaintiff funds and

defendant K.C. Excavating and Grading, Inc. ("KCE"). The collective bargaining agreements obligate KCE to timely remit fringe-benefit contributions to plaintiff funds based upon the number of payroll hours worked by employees covered by the agreements and to hire all operating engineers through Local 101's hiring hall. The plaintiff funds allege that defendant KCE, and its alleged alter-ego G&C Excavating, L.L.C. ("GCE"), have failed to meet their obligations under the agreements to pay fringe benefit contributions since September 2000. Plaintiffs further allege that defendants violated the agreements in bypassing the Union's hiring hall to hire their current operating engineers, who are covered by the agreements.

The factual record in this case is both lengthy and complex. Plaintiffs' recitation of uncontroverted facts spans some twenty pages. Defendants did little to assist the Court in determining the existence of genuine disputes of fact in that defendants' responses to many of the proposed uncontroverted facts consist of a reference to a general denial, which appears to dispute the form rather than the substance of the proposed facts.[1] Defendants had the burden of addressing the proposed uncontroverted facts individually and specifically. Defendants' general objection is an inadequate response. Where defendants fail to point out a specific dispute and merely rely on the general objection, the Court deems those facts admitted. With that said, the

[1]Plaintiffs set forth 73 proposed uncontroverted facts in their brief. In response to approximately thirty of the proposed uncontroverted facts, defendants merely state: "[This paragraph] of Plaintiffs' Motion is controverted for the same reasons as stated in response to Paragraph 1 above." Paragraph 1, while too lengthy to quote here, essentially states that plaintiffs' allegations state legal conclusions, not facts, that are only supported by self-serving affidavits. The Court does not agree with defendants' argument that plaintiffs set forth thirty paragraphs worth of legal conclusions. Further, the Court notes that defendants attack the affidavit of Thomas L. Wilson, administrator of the plaintiff funds, as "self-serving," yet defendants rely solely on their own self-serving affidavits to oppose plaintiffs' motion for summary judgment.

following facts are undisputed:

The now-defunct KCE was a commercial excavating and grading business, which operated in the Kansas City area. Garry Wyatt was the owner, president and sole shareholder of KCE. His wife, Christina Wyatt, served as secretary. Both Christina and Garry Wyatt had authority to sign KCE checks. Although the Wyatts dispute that Christina Wyatt had authority to sign KCE checks, plaintiffs produced copies of hundreds of KCE checks bearing Christina Wyatt's signature (by stamp). The Wyatts' general denial does not dispute Christina Wyatt's signature stamp being used on hundreds of KCE checks.

KCE was bound to two collective bargaining agreements with the union: (1) the agreement between the Associated General Contractors of Missouri and Operating Engineers Local No. 101 ("AGC agreement"); and (2) the Individual Heavy Contractors Agreement ("IHC agreement").[2] The IHC agreement obligates employers to submit, among other things, fringe benefit contributions to the plaintiff funds for each hour worked by employees covered under the agreement. The AGC agreement similarly obligates employers to submit fringe benefit contributions to the plaintiff funds for each hour worked by employees covered under the agreement. The IHC and AGC agreements also require that signatory employers hire all operating engineers through Local 101's hiring hall. Since January 1, 2001, KCE has failed to solicit the union's hiring hall for referral of operating engineers. Defendants dispute that KCE owes any money to the funds. Defendants state that KCE has submitted all appropriate fund

[2]The Court deems these facts admitted because defendants merely assert the general denial discussed above to controvert these facts. Defendants do not specifically dispute any of plaintiffs' uncontroverted facts relating to the collective bargaining agreements or the obligations imposed by them.

contributions to plaintiffs.

On September 14, 2000, while KCE was still doing business, Garry Wyatt formed GCE and named himself as the company's sole member. On October 23, 2000, the Articles of Organization were amended to reflect that Christina Wyatt was the sole member of GCE. GCE, like KCE, also engages in heavy commercial excavating and grading in the Kansas City area. In January 2001, KCE ceased doing business and discharged all of its employees.[3] In January 2001, GCE commenced operations. It was started with $20,000 in startup capital from Christina Wyatt's personal savings. Of the nine employees on GCE's payroll in 2001, eight of them had worked for KCE when it closed. GCE is not a signatory to any collective bargaining agreements in its proper name. Further, no fringe-benefit contributions have been remitted to the plaintiff funds on behalf of GCE employees based upon work performed for GCE. Finally, GCE has never solicited the union's hiring hall for referral of operating engineers.

GCE operated out of the Wyatts' private residence in Urich, Missouri, for a short time in late 2000.[4] In early 2001, GCE and KCE both operated out of offices located at 16519 E. Truman Road, Independence, Missouri. GCE and KCE also shared a post office box.[5] Once KCE ceased doing business, GCE acquired KCE's computer system, bookkeeping software, payroll software, and filing systems. GCE also acquired much of KCE's office equipment,

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[3]The parties dispute whether KCE ceased doing business in late 2000 or in January 2001. This dispute is discussed and resolved below.

[4]Christina and Garry Wyatt dispute this fact, but plaintiffs produced several GCE checks bearing the Wyatts' Urich, Missouri, address.

[5]Again, the parties dispute this fact, but plaintiffs produced several KCE and GCE documents showing that both business, at various times, used the Truman Road address and the post office box.

furniture and supplies. Plaintiffs suggest that GCE acquired these items free of charge. Christina and Garry Wyatt state that they purchased all of these items. In any event, there are no records of the transactions and the Wyatts claim they do not recall the particulars of such transactions. In addition to acquiring office supplies and furniture from KCE, GCE is currently leasing equipment formerly used by KCE, some of which still bears KCE's logo.

As owner of GCE, Christina Wyatt retains ultimate authority over GCE's operations. Garry Wyatt is employed as GCE's project manager/field superintendent. He has the power to hire and fire (he is the only such person besides Christina Wyatt with such power). Garry Wyatt earns $5.75 per hour from GCE, which is less than any other GCE employee. Christina Wyatt concedes that Garry Wyatt is part of the control group of GCE.

It appears from the depositions and affidavits submitted along with the parties' briefs that there are basically five so-called fact disputes between the parties. First, defendants dispute that KCE transacted business in January 2001. Defendants state in their depositions and affidavits that KCE wound up business in late 2000. However, plaintiffs filed with their motion for summary judgment an Employers Contribution Report, which was submitted to the union from KCE for January 2001. It lists the hours worked by two KCE employees in January 2001. Accordingly, KCE did transact business in January 2001.

The second major dispute between the parties involves the type of work performed by KCE and GCE. Defendants maintain that KCE and GCE perform substantially different types of work. It is undisputed that KCE and GCE both perform commercial excavating and grading, but Garry and Christina Wyatt both stated in their depositions and affidavits that KCE generally performed much larger-scale projects than does GCE. Garry Wyatt admitted in his deposition,

however, that GCE's largest project to date is the Shawnee Station Apartments, which is a $500,000 project and, therefore, within the price range of projects completed by KCE. In fact, KCE had previously bid on the Shawnee Station Apartments project before it ceased doing business. In sum, the depositions and affidavits show that KCE and GCE perform substantially similar work. Both KCE and GCE perform commercial excavating and grading in the Kansas City area, and there is much overlap between the size of projects taken on by both KCE and GCE. The record does not support defendants' contention that KCE and GCE perform substantially different work.

The third major dispute between the parties involves Christina Wyatt's ability to operate heavy equipment. There is conflicting evidence as to her ability to operate heavy equipment, but this factual dispute is not material to the resolution of the case.

The fourth major dispute between the parties involves the reason why KCE stopped doing business. Garry Wyatt stated in his deposition that he did not have the funds to keep KCE going. He stated that KCE ran out of business. Plaintiffs rely on KCE's 1999 tax return (the most recent tax return KCE produced) to show that KCE was not in financial trouble such that it had to cease doing business. The 1999 tax return shows that KCE earned $320,082 in 1999 on gross revenues of $4,492,930. Garry Wyatt's unsupported statement that KCE shut down because it ran out of business is not sufficient to create a genuine fact dispute.

The fifth major dispute between the parties involves Christina Wyatt's motive for starting GCE. Christina Wyatt stated in her deposition that she started GCE because she wanted to operate a business herself. She said she had watched her husband run his own business and she wanted the same for herself. Plaintiffs argue that Christina Wyatt actually started GCE after

KCE ceased doing business in order to avoid KCE's obligations to the union. This is a genuine fact dispute, but its resolution is not necessary to decide the summary judgment question. Motive to avoid union obligations is certainly relevant in this case, but it is not necessary in order to find alter ego status.

II. Standard

A motion for summary judgment should be granted if, viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Rafos v. Outboard Marine Corp., 1 F.3d 707, 708 (8th Cir. 1993) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)). In ruling on a motion for summary judgment, it is the court's obligation to view the facts in the light most favorable to the adverse party and to allow the adverse party the benefit of all reasonable inferences to be drawn from the evidence. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Reed v. ULS Corp., 178 F.3d 988, 990 (8th Cir. 1999).

III. Discussion

Plaintiff funds first assert a claim for relief pursuant to § 502 and § 515 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1132 and 1145, based upon defendants' alleged failure and refusal to remit contractually-mandated fringe-benefit contributions for covered hours worked by defendants' operating engineers. Section 515 of ERISA provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Employers who fail to meet the obligations set forth in § 515 are liable for contributions, court

costs, attorney's fees, plus liquidated damages and interest as prescribed under the terms of the plan or a collectively bargained agreement. 29 U.S.C. § 1132(g)(2).

Plaintiff funds also assert a claim pursuant to § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, based upon defendants' alleged violation of the IGC and AGC collective bargaining agreements in failing and refusing to seek referrals for operating engineers through the union's hiring hall. Section 301(a) authorizes federal lawsuits by signatory unions to enforce the terms of the their collective bargaining agreements. 29 U.S.C. § 185(a); Kansas City Southern Transport Co., Inc. v. Teamsters Local Union #41, 126 F.3d 1059, 1063-64 (8th Cir. 1997).

For each of the claims, plaintiffs allege that KCE and GCE are jointly and severally liable even though KCE is the only signatory to the collective bargaining agreements.[6] Although not a signatory to the agreements, plaintiffs allege that GCE is liable because it is the alter-ego of KCE. Because the standards for determining alter ego status differ under ERISA and the LMRA, the claims will be discussed separately below.[7]

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[6]Although the Wyatts dispute that KCE is bound to the agreements, the Court finds that KCE is bound to the current AGC and IHC collective bargaining agreements with the union. The Honorable Howard Sachs so held in a recent decision in another case involving KCE and the union. Operating Eng'rs Local No. 101 Pension Fund v. Wyatt, No. 98-0452-CV-W-9-6, slip op. at 9-11 (W.D. Mo. Feb. 24, 2000). Judge Sachs held that KCE was bound to the current AGC and IHC collective bargaining agreements because Garry Wyatt had complied with the terms of the collective bargaining agreements, even though he had not signed them, by submitting work reports, making fringe benefit contributions, and paying wages according to the AGC and IHC agreements. Id. KCE is collaterally estopped from re-litigating this issue. See Lovell v. Mixon, 719 F.2d 1373, 1376 (8th Cir. 1983).

[7]In Greater Kansas City Laborers Pension Fund v. Superior General Contractors, Inc., 104 F.3d 1050 (8th Cir. 1997), the Eighth Circuit explained that the standard for determining alter ego status under the NLRA differs from the standard for determining alter ego status under ERISA. Id. at 1055 ("The factors . . . for determining alter ego status under labor law do not control the

A. Alter Ego Analysis for ERISA Claim

Plaintiff funds assert a claim for relief pursuant to Sections 502 and 515 of ERISA, 29 U.S.C. §§ 1132 and 1145, based upon defendants' alleged failure and refusal to remit contractually-mandated fringe-benefit contributions for covered hours worked by defendants' operating engineers.

As discussed above, defendant KCE is a signatory to the union agreements at issue, therefore, its obligations under the two collective bargaining agreements are not in dispute. Plaintiffs further allege, however, that defendant GCE is also obligated under the agreements to remit fringe-benefit contributions even though it is not a signatory to either agreement because it is the alter ego of KCE. Plaintiffs ask the Court to find that KCE and GCE are both bound by the agreements and that they are jointly and severally liable for the unpaid fringe-benefit contributions. Plaintiffs allege that defendants are liable for: $35,398.53 in unpaid contributions; $7,326.70 in liquidated damages; and $1,157.25 in interest.

The Eighth Circuit has held that courts evaluating alter ego claims under ERISA should use corporate law principles. Greater Kansas City Laborers Pension Fund v. Superior General Contractors, Inc., 104 F.3d 1050, 1055 (8th Cir. 1997).

> [T]he alter ego doctrine as developed under corporate law provides that the legal fiction of the separate corporate entity may be rejected in the case of a corporation that (1) is controlled by another to the extent that it has independent existence in form only and (2) is used as a subterfuge to defeat public convenience, to justify wrong, or to perpetuate a fraud.

Id. "'The essence of the [alter ego] test is whether, under all the circumstances, the transaction

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[corporate relationship in this case] because the present action arises under §§ 502(g) and 515 of ERISA.").

carries the earmarks of an arm's length bargain. If it does not, equity will set it aside." In re B.J. McAdams, Inc., 66 F.3d 931, 937 (8th Cir. 1995) (quoting Pepper v. Litton, 308 U.S. 295, 307 (1939)). In this case, the Court must determine whether there is a disputed issue of material fact as to whether GCE has an existence independent from KCE, whether GCE was created and used to perpetrate a fraud, and whether transactions between the two companies were carried out at arm's length.

The Court will first examine the issue of whether GCE has an existence independent from KCE. It is undisputed that KCE was created and owned by Garry Wyatt, and that GCE was also created by Garry Wyatt only months before KCE ceased doing business (Christina Wyatt's name was substituted as sole member and owner of GCE shortly after Garry Wyatt filed the necessary paperwork with the state). It is also undisputed that Christina Wyatt served as secretary for KCE with authority to sign KCE checks and that Garry Wyatt is part of the "control group" of GCE (along with Christina Wyatt). Christina Wyatt stated in her deposition that, prior to the formation of GCE, she had no prior experience running a business, that she had no prior experience running heavy equipment, and that she had only operated heavy equipment out of curiosity and never on a construction project. Despite her lack of experience in running a business and her lack of knowledge about heavy equipment and excavating, Christina Wyatt stated in her deposition that she decided to start GCE because her husband had operated a business and because she wanted the same opportunity. These undisputed facts show that Garry and Christina Wyatt were both very involved in the management of both KCE and GCE.

It is also undisputed that KCE and GCE were businesses engaged in heavy excavating and grading in the Kansas City area. Both businesses have accepted small and large projects.

Both businesses have shared office space in the same building and have shared a post office box. GCE even operated out of the Wyatts' family home for a short time. GCE acquired much of its office equipment, furniture, supplies, equipment, and vehicles from KCE. Finally, of the nine employees on GCE's payroll in 2001, eight of them had worked for KCE when it closed. The facts detailed above show that GCE does not have an existence independent of KCE.

Next, plaintiffs argue that the Wyatts ended KCE and started GCE in order to avoid its obligations to the unions. The Wyatts dispute this allegation with only a general denial. Garry Wyatt stated in his deposition that KCE ceased doing business because it simply ran out of work. Plaintiffs dispute this statement with KCE's 1999 tax return showing that KCE earned over $300,000 that year. Further, plaintiffs have established that GCE got the contract for at least one job that KCE had initially bid on.

The record before the Court does not support Garry Wyatt's assertion that KCE ceased doing business because it ran out of work. In fact, Garry Wyatt did not offer the Court any evidence of KCE's financial troubles other than his unsupported statement. Even viewing the facts in the light most favorable to defendants, it does not appear that KCE ceased doing business for any reason other than to avoid union obligations. Of course, the Wyatts have not admitted that GCE was created and used to avoid union obligations, but the evidence overwhelmingly points to that conclusion. The Wyatts cannot avoid summary judgment by merely denying fraudulent intent. If that were the case-, the entry of summary judgment would never be possible in a case like this one. Each case would have to proceed to trial. It is only logical that a defendant's unsubstantiated denial of fraudulent intent, without more, cannot insulate him from entry of summary judgment.

Finally, the record demonstrates that the transactions between the companies were not carried out at arm's length. As mentioned above, GCE acquired from KCE much of its office equipment, furniture and supplies. Christina Wyatt does not recall if there was a written agreement detailing the purchases, nor does she recall how much she paid. Further, Christina Wyatt stated in her deposition that she leased GCE's office space on Truman Road from K.C. Holdings, Inc., which is a corporation wholly owned by Garry Wyatt. She stated that she did not have a written lease agreement with K.C. Holdings, Inc. and that she does not recall writing any checks for rent. GCE does have a written equipment lease agreement with KCE, but KCE never formally notified the lienholder of the lease agreement with GCE.

None of these transactions have the appearance of having been made at arm's length. First, the transactions were essentially between husband and wife (each owning one of the companies at issue). Second, most of the transactions were not set forth in writing. Third, Christina Wyatt states that she cannot remember how much she paid for the office equipment, furniture and supplies, and whether she paid any rent for the Truman Road office at all. These aspects of the transactions are not characteristic of arm's length transactions.

In sum, the undisputed facts show that: (1) GCE does not have an existence independent from KCE; (2) GCE was created and used to perpetrate a fraud; and (3) transactions between the two companies were not carried out at arm's length. Because all three of these elements are present, the Court finds that there are no material facts in dispute and that GCE is the alter ego of KCE for the purposes of the ERISA claim and is, therefore, bound by the collective bargaining agreements.

B. Alter Ego Analysis for the NLRA Claim

Plaintiffs also assert a claim for relief on behalf of its membership under § 301 of the LMRA, 29 U.S.C. § 185. Plaintiffs allege that defendants violated the hiring hall provisions of the IGC and AGC collective bargaining agreements in that GCE has failed and refused to honor the hiring hall provisions contained in the agreements. Plaintiffs argue that GCE is bound to the hiring hall provisions in the collective bargaining agreements because it is the alter ego of KCE, which is a signatory to the agreements. Plaintiffs argue that they are entitled to recover unpaid wages on behalf of applicants who were properly on the out-of-work list at the time the covered work was performed by GCE operating engineers. Plaintiffs allege that defendants owe a total of $99,960.44 in unpaid wages.

In order to determine whether GCE is bound to the collective bargaining agreements' hiring hall provisions, the Court must determine whether GCE is the alter ego of KCE. Although the Court determined above that GCE is the alter ego of KCE for the purposes of the ERISA claim, the Eighth Circuit has made clear that the alter ego test in the ERISA context differs from the alter ego test in the labor law context. See Greater Kansas City Laborers Pension Fund v. Superior General Contractors, Inc., 104 F.3d 1050, 1055 (8th Cir. 1997). The Eighth Circuit stated:

> The alter ego doctrine as developed under the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq., involves a more lenient standard for disregarding the corporate form than that employed in corporate law. The focus of the labor law alter ego doctrine "is on the existence of a disguised continuance of a former business entity or an attempt to avoid the obligations of a collective bargaining agreement."

Id. at 1055 (quoting Iowa Express Distrib., Inc. v. NLRB, 739 F.2d 1305, 1310 (8th Cir. 1984)).

The Eighth Circuit has stated the following factors to determine whether one entity is the

alter ego of another under the labor laws: whether there is substantially identical ownership, management and supervision, business purpose, operation, customers, and equipment. Iowa Express Distrib., Inc. v. NLRB, 739 F.2d 1305, 1310 (8th Cir. 1984). Another relevant factor is whether there is a substantial continuity of the work force from the union to the non-union employer. Id.

The Court finds that it is unnecessary to again describe the relationship between KCE and GCE because it has been adequately discussed with regard to the ERISA claim. This approach is especially appropriate since the Eighth Circuit has commented that the alter ego doctrine under the NLRA involves a more lenient standard for disregarding the corporate form than that used to determine alter ego status under corporate law and ERISA. If GCE met the more strict ERISA alter ego test, it certainly meets the more lenient labor law alter ego test. With that said, the Court finds that the undisputed facts in this case establish that GCE is the alter ego of KCE for the purposes of the NLRA claim because GCE is a disguised continuance of KCE.

As discussed above, the ownership, management, business purpose, operation, customers and equipment are substantially the same for KCE and GCE. Further, there is a substantial continuity of the work force from KCE, the union employer, to GCE, the non-union employer. In fact, of the nine employees on GCE's payroll in 2001, eight of them had worked for KCE when it closed. Although Garry and Christina Wyatt have generally denied the substantial similarity between the two entities, they have failed to show that there are any genuine issues of material fact for trial. For these reasons, the Court concludes that GCE is the alter ego of KCE for the purposes of the NLRA claim, therefore, GCE is bound by the hiring hall provisions contained in the collective bargaining agreements.

IV. Conclusion

The Court finds that GCE is the alter ego of KCE for the purposes of both the ERISA claim and the NLRA claim. As KCE's alter ego, GCE is also bound to the current AGC and IHC collective bargaining agreements. KCE and GCE are jointly and severally liable for the unpaid contributions and union wages. Plaintiffs are awarded damages in the total amount of $143,842.92. This total amount can be itemized as follows: $35,398.53 in unpaid contributions; $7,326.70 in liquidated damages; $1,157.25 in accrued interest through December 12, 2001; and $99,960.44 in unpaid wages. Accordingly, it is hereby

ORDERED that plaintiffs' Motion for Summary Judgment (Doc. #35) is granted. It is further

ORDERED that plaintiffs' Motion for Order Granting Plaintiffs' Unopposed Motion for Summary Judgment (Doc. #37) is dismissed as moot. It is further

ORDERED that plaintiffs are awarded damages in the total amount of $143,842.92.

S/Scott O. Wright
SCOTT O. WRIGHT
Senior United States District Judge

Dated: 3-11-02